IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-458

STATE OF NEW JERSEY, pursuant to § 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b),

Petitioner,

vs.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, and CHRYSLER CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. Section 12(b) is grounded upon the Supreme Court's support for both control by the states over their governmental agencies and innovative legislative techniques, as well as the clear language of Rule 17(b) of the Federal Rules of Civil Procedure	7
II. Section 12(b) is not in conflict with, and does not encroach upon the class action procedures of Rule 23	12
III. The District Court Order falls squarely within the meaning of the *Cohen* doctrine of finality	14
IV. The Court of Appeals erred by not reviewing the abuse of discretion by the District Court in refusing to permit the motion to amend	18
CONCLUSION	20
APPENDIX:	
A—28 U.S.C. § 1291 and Federal Rules of Civil Procedure 15, 17, 23	1a
B—Opinion of the District Court	8a
C—Opinion and Order of the Court of Appeals	11a

PAGE

Cases Cited

Beck v. Wings Field, Inc., 122 F.2d 114 (3d Cir. 1941) 19

Bowles v. Simon, 145 F.2d 334 (7th Cir. 1944) 19

Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906) 10

Chicago Title and Trust Co. v. Forty-one Thirty-six Wilcox Building, 302 U.S. 120 (1937) 9

Claiborne v. Brooks, 111 U.S. 400 (1884) 9

Cohen v. Beneficial Industrial Loan Corp, 337 U.S. 541 (1949) 14-16

Dartmouth College v. Woodward, 4 Wheat. (17 U.S.) 518 (1819) 8

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) 10

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950) 14

Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974) 15, 16

Exmoor Country Club v. United States, 119 F.2d 961 (7th Cir. 1941) 19

Foman v. Davis, 371 U.S. 178 (1962) 18, 19

Georgia v. Evans, 316 U.S. 159 (1942) 11

Gillespie v. U. S. Steel Corp., 379 U.S. 148 (1964) 15

Hunter v. Pittsburgh, 207 U.S. 161 (1907) 9

Illinois v. Associated Milk Producers, Inc., 351 F. Supp. 436 (N.D. Ill. 1972) 13

Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966), *reh. denied*, 384 U.S. 967 (1966) 13

PAGE

Kelly v. Brunswick, 200 Va. 45, 104 S.E.2d 7 (1915).. 9

Lipsett v. United States, 359 F.2d 956 (2d Cir. 1966) 19

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 16

Meriwether v. Garrett, 102 U.S. 472 (1880)..... 8

Moses Lake School Dist. v. Big Bend Community College, 81 Wash.2d 551, 503 P.2d 86 (1973)..... 9

Nebbia v. New York, 291 U.S. 502 (1934)..... 11

Neuenschwander v. Washington Suburban Sanitary Comm'n, 187 Md. 67, 48 A.2d 593 (1946)..... 9

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 14

Reynolds v. Sims, 377 U.S. 533 (1964)..... 9

Sailors v. Board of Educ., 387 U.S. 105 (1967)..... 10

Sanders v. John Nuveen & Company, 463 F.2d 1075 (7th Cir. 1972)..... 12

Sproles v. Binford, 286 U.S. 374 (1932)..... 13

Stack v. Boyle, 342 U.S. 1 (1951)..... 18

Trenton v. New Jersey, 262 U.S. 182 (1923)..... 8

United States v. Ryan, 402 U.S. 530 (1971)..... 17

Waller v. Florida, 397 U.S. 387 (1970)..... 9

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36 (1933)..... 11

United States Constitution Cited

Tenth Amendment 2

PAGE

Statutes Cited

Clayton Act:

Section 4 (15 U.S.C. § 15) 3, 10

Section 16 (15 U.S.C. § 26) 3

New Jersey Antitrust Act:

N.J.S.A. 56:9-1 3

N.J.S.A. 56:9-12(b) 2-7, 10-13, 16-18

N.J.S.A. 40:18-3, 43-1, 69A-29(c) 10

28 U.S.C.:

§ 1254(1) 2

§ 1291 ..... 2, 3, 5, 14

§ 1407 4

Rules Cited

Federal Rules of Civil Procedure:

Rule 15 3

Rule 15(a) 4, 18

Rule 17(b) 2, 3, 5-7, 9, 10, 12, 17, 19

Rule 23 ..... 2, 3, 6, 12, 17, 19

Other Authorities Cited

B.N.A. Antitrust & Trade Regulation Report, No. 680 (Sept. 17, 1974) 16

9 J. Moore Federal Practice (2d Ed. 1973):

¶110.01, at 48 14

¶110.07, at 109 14

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, State of New Jersey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 22, 1974.

Opinions Below

The unpublished orders and opinions of the United States Court of Appeals for the Seventh Circuit and the

United States District Court for the Northern District of Illinois appear in the Appendix hereto.

Jurisdiction

The order of the Court of Appeals was entered on July 22, 1974. No motion for reconsideration was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the District Court may deny, as in conflict with Rule 23 Federal Rules of Civil Procedure, the State of New Jersey's motion to amend its complaint which sought to assert powers granted to the State by Section 12(b) of the New Jersey Antitrust Act, and thereby subvert, (a) the historical power reserved to the states to control their governmental subdivisions and agencies; (b) the constitutional and statutory power of the State of New Jersey to control its governmental subdivisions and agencies in accordance with Rule 17(b) of the Federal Rules of Civil Procedure; and (c) the right of a state to create centralized antitrust enforcement.

2. Whether the denial of the amendments in the circumstances of this action is a final appealable order pursuant to 28 U.S.C. § 1291 within the meaning of the *Cohen* doctrine.

Constitutional and Statutory Provisions Involved

The underlying constitutional principle involved in the instant case is the Tenth Amendment to the United States Constitution which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant statutes involved include 28 U.S.C. § 1291 and the New Jersey Antitrust Act, N.J.S.A. 56:9-1 *et seq.*, particularly Section 12(b), which states, in relevant part:

> "The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law."

The Federal Rules of Civil Procedure are involved, in particular Rules 15, 17 and 23. The relevant statute and federal rules are set forth in the Appendix (App. A at 1a).

Statement of the Case

The State of New Jersey, along with numerous other states and governmental entities, has brought a civil antitrust treble-damage action against General Motors Corporation, Ford Motor Company, and Chrysler Corporation (hereinafter "respondents") charging, *inter alia*, that respondents conspired in restraint of trade by withdrawing the special consideration granted to governmental fleet purchasers of motor vehicles. The jurisdiction of the District Court was invoked because the action arises under the federal antitrust laws. Petitioner asserts the right to enforce such laws as granted by Sections 4 and

16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. These actions have been consolidated and transferred, pursuant to 28 U.S.C. § 1407, for coordinated pre-trial proceedings in the Northern District of Illinois before the Honorable Frank J. McGarr.

Petitioner moved the District Court for leave to file an amended complaint pursuant to Rule 15(a), Federal Rules of Civil Procedure, and was granted permission to do so on July 18, 1973. Respondents moved the court below to dismiss the amended complaint. The District Court, in a memorandum opinion and order on March 7, 1974, then denied the motion for leave to file the amended complaint (App. B at 8a).

Petitioner sought to amend the original complaint in order to correct its mistake in form regarding the manner in which the action was brought. The New Jersey Antitrust Act is only four years old but no action was taken under the Act and no enforcement agency was created until two years after passage of the Act. This action was one of the first actions brought pursuant to Section 12(b) of the Act. Inadvertently and incorrectly the complaint was permitted to contain "class action" language along with the language setting forth the fact that the action was brought pursuant to Section 12(b). Petitioner's federal complaint forms were styled and patterned after the form of complaints filed by the petitioner, State of New Jersey, prior to the passage of the Antitrust Act. The powers granted to the Attorney General were new but our forms were old. Although petitioner was unfamiliar with the form of the pleading, our intent was clear throughout the course of the litigation that the action was brought by the Attorney General, on behalf of the State, pursuant to Section 12(b).

Section 12(b) manifests the State Legislative intent to create centralized antitrust enforcement by compelling the political subdivisions and public agencies of the State to obtain permission from the Attorney General before they may initiate antitrust actions under State or federal law. Rule 17(b) of the Federal Rules of Civil Procedure confirms the State's power to control capacity to sue by declaring that the State of incorporation determines the capacity to sue and be sued. Since State subdivisions were not granted permission to sue individually, by the institution of this suit the action was on behalf of one unitary plaintiff, the State, as the State is composed of all its agencies and departments.

To concisely set forth the right granted to the Attorney General and to rectify our error in form, we sought leave to file the amendments. However, Judge McGarr, without oral argument, denied the motion to amend and went beyond our mistake in form by interpreting Section 12(b) as changing the action into "a class action on behalf of all the unnamed political subdivisions of the State" (App. B at 10a). In addition, he found that the State could proceed on behalf of the State subdivisions and agencies "which become named plaintiffs and authorize the State Attorney General to represent them" (App. B at 10a). In misconstruing the plain words of the Act the District Court made no reference or comment on the permission provision of Section 12(b), or to the applicability of Rule 17 (b) of the Federal Rules of Civil Procedure. In order to prevent substantive rights of the Attorney General from being rendered a nullity we filed a timely Notice of Appeal from the District Court's order on March 29, 1974, and respondents moved to dismiss the appeal on the premise that it was not a final appealable order under 28 U.S.C. § 1291. By order of the Court of Appeals dated May 20,

1974, petitioner-appellant was permitted to respond to the motion to dismiss in its principal brief on appeal.

The Court of Appeals, in its July 22, 1974 order granting the motion to dismiss, found that the District Court order, within the framework of the *Cohen* doctrine of finality, was a claim of right collateral to, and separable from rights asserted in the primary action, but that it was not "too important to be denied review," and did not harm any substantive rights of New Jersey. Again, there was no mention of Rule 17(b), F. R. Civ. P., nor its relationship to the permission provision of Section 12(b) of the New Jersey Act. The Court of Appeals also confused Section 12(b) and the role of the Attorney General thereunder with the role of a class representative under Rule 23, F. R. Civ. P. The Court of Appeals concluded that:

> "Apparently, the difference between the original complaint and the proposed amended complaint is that in the latter, New Jersey sought to *represent* its political subdivisions without complying with the class action requirements of Rule 23, FRCP." (App. C at 12a n. 1.) (Emphasis supplied)

In so finding and in denying the appeal, the Court of Appeals restricts the historical power the states wield over their governmental agencies, disregards the clear language of both Rule 17(b), F. R. Civ. P., and Section 12(b) of the New Jersey Act, and nullifies State substantive rights.

Reasons for Granting the Writ

Because the lower courts have interpreted an important state statute inconsistently with ruling federal and state precedents, and thus drastically affected a national policy

favoring innovative antitrust enforcement, we begin with a brief overview of the fundamental rules supporting the right of a state to create a centralized antitrust authority, as exemplified by Section 12(b).

POINT I

Section 12(b) is grounded upon the Supreme Court's support for both control by the states over their governmental agencies and innovative legislative techniques, as well as the clear language of Rule 17(b) of the Federal Rules of Civil Procedure.

The nucleus of the State of New Jersey's unique antitrust enforcement program is Section 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b). Section 12(b) authorizes the State, by its Attorney General, to bring antitrust actions on behalf of the political subdivisions and public agencies of the State. Moreover, governmental subdivisions and agencies may not initiate antitrust suits on their own behalf unless they first obtain the permission of the Attorney General to do so. By controlling the capacity to sue of State governmental agencies, New Jersey has created a centralized State antitrust enforcement agency and magnified both the potential to recoup past excess charges resulting from antitrust violations, as well as the investigative resources of the central antitrust authority.

Numerous benefits which accrue to all governmental units in the State, and the public at large, as a result of the unitary plaintiff created by Section 12(b), include (1) the ability to increase treble-damage or settlement recoveries by eliminating the capacity of State governmental units to "opt out" of any actions brought on their behalf;

(2) the ability to choose a broad-based State antitrust suit rather than permit fragmentized local actions; (3) the authority to present a unified, single and powerful plaintiff, the State, in the conduct of the litigation; (4) notice to the central enforcement agency of violations as yet unearthed by that agency, and (5) a central state clearing house for detecting and litigating antitrust violations with consequent savings to the public of time, manpower and money.

In denying petitioner's motion to amend its complaint, the lower courts apparently have been unmindful of the extent to which the States may control the powers of their own State agencies, and the extent to which this Court will support forceful State measures to combat antitrust violations. Clearly, the "common learning, found in all adjudications on the subject of municipal bodies and repeated by textwriters," *Meriwether* v. *Garrett*, 102 U. S. 472, 511 (1880), and as often repeated by this Court since *Dartmouth College* v. *Woodward*, 4 Wheat. (17 U. S.) 518 (1819), is that political subdivisions of a State are merely arms, creatures, and departments of the State, created as convenient agencies to exercise whatever State governmental powers may be entrusted to them. As municipal corporations, political subdivisions obtain all their powers from their creator, the State, by action of the State legislature.[1] Thus, any question as to the duration,

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[1] Interestingly, in finding that "[a] municipality is merely a department of the state," the Supreme Court, in *Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923), held:

> "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. *Id.*

(Footnote continued on following page)

extent or character of the powers of State departments can be resolved only by the supreme power of the sovereign State, "for it is a question that relates to the internal constitution of the body politic of the State." *Claiborne* v. *Brooks*, 111 U. S. 400, 410 (1884).[2] As Chief Justice Warren concluded in *Reynolds* v. *Sims*:

> "Political subdivisions of States-counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." 377 U. S. 533, 575 (1964); *see Waller* v. *Florida*, 397 U. S. 387, 392-93 (1970) (Burger, C.J.)

This power over, and control by the State of its governmental units is distinctly acknowledged by the Federal Rules of Civil Procedure.

Rule 17(b) of the Federal Rules of Civil Procedure recognizes that the capacity to sue is determined by the State. *Chicago Title and Trust Co.* v. *Forty-one Thirty-six Wilcox Bldg.*, 302 U. S. 120, 124 (1937). In New Jer-

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(Footnote continued from preceding page)

The settled doctrine of the Court is that the State, conditionally or unconditionally, may expand or contract all powers of the municipal corporations which are the political subdivisions of the State, as well as destroy the corporation. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 177-78 (1907).

[2] *See, e.g., Neuenschwander* v. *Wash. Suburban Sanitary Comm'n*, 187 Md. 67, 48 A.2d. 593 (1946); *Kelly* v. *Brunswick*, 200 Va. 45, 104 S.E.2d. 7 (1915); *Moses Lake School Dist.* v. *Big Bend Community College*, 81 Wash.2d. 551, 503 P.2d 86 (1973).

sey, municipal corporations and political subdivisions are granted the right to sue and be sued by the State Legislature. N.J.S.A. 40:18-3, 43-1, 69A-29 (e). Only if the subdivisions of a State have the permission to sue, may they be recognized as "persons" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 396 (1906). The State Legislature has chosen to subordinate the right to sue of State agencies, *i.e.*, the right to be a "person," to a unitary State action in deference to the policies underlying integrated State antitrust enforcement. Thus, Section 12(b) is consistent with Rule 17(b), F. R. Civ. P. and the unanimous body of law regarding State control over State governmental agencies.

The salutary effects of Section 12(b) are in accord with the Supreme Court's long-standing encouragement of private antitrust enforcement, and innovative legislative measures. The State Legislature, in fashioning the novel approach of Section 12(b) as a statutory weapon to combat the economic malignancy of antitrust violations, is consistent with the Supreme Court's steadfast support for the proposition that the States be granted "vast leeway in the management of [their] internal affairs." *Sailors* v. *Bd. of Educ.*, 387 U. S. 105, 109 (1967). As the States have extensive latitude to resolve their economic problems they have "constitutional authority to experiment with new techniques . . ." *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952). Within the framework of the federal laws,

> "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is

declared by the legislature, to override it." *Nebbia* v. *New York*, 291 U. S. 502, 537 (1934).

"The importance of the question in the enforcement of the Sherman Law," *Georgia* v. *Evans*, 316 U. S. 159, 161 (1942), should not be abated by judicial obstacles thrown in the path of State legislative innovations. Section 12(b), far from being a mischievous creation, has the "[f]urtherance of the public good . . . written over the face of this statute from beginning to end as its animating motive." *Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36, 41 (1933).

The New Jersey Legislature has devised a rational measure to eliminate the evils of lack of stringent antitrust enforcement and the loss of monetary recoveries resulting therefrom. Centralized enforcement and State control over the "opt outs" of an action optimizes antitrust deterrence by, *inter alia*, maximizing the potential State recovery. It is important to the welfare of New Jersey's antitrust program, as well as to the present and potential programs of all other States, that the court exercise its discretion in granting the petition for certiorari. In irremediably diluting the power the States possess over their agencies, the lower courts have abrogated the beneficial rippling effects which unique enforcement by each State in the Federal Union could have on antitrust enforcement in general. Judicial leeway for novel State techniques demands much more than a cursory and confusing denial of New Jersey's Constitutional right to control its governmental agencies and a dismantling of the centralized bureau created by Section 12(b).

POINT II

Section 12(b) is not in conflict with, and does not encroach upon the class action procedures of Rule 23.

There is no class action here, and Section 12(b) is not a subversion of, nor substitution for Rule 23 safeguards. Rather, Section 12(b) is in concert with the policies underlying class action Rule 23, such as the orderly administration of actions in the federal courts. However, there can be no class action on behalf of State subdivisions if there is no "class" of independent entities potentially capable of suing. The State Legislature subordinated the right to sue of State agencies to the greater good of a single centralized State action.

Generally, class members under Rule 23 are afforded notice of their rights and privileges. *Sanders* v. *John Nuveen & Co.*, 463 F. 2d 1075, 1082 (7th Cir. 1972). But, under the power granted by Section 12(b), once the State sues, the State governmental agencies and departments are ineluctably bound to the State action because they are the State. Procedural Rule 23 cannot be used to grant rights and privileges to State agencies which the State has not granted or has seen fit to control, regardless of the number of agencies that may be involved in the litigation.

The District Court turns both Section 12(b) and Rule 17(b), F. R. Civ. P. on their heads by confusing Section 12(b) with Rule 23[3]. Contrary to the explicit language of Section 12(b) requiring that State subdivisions and agen-

[3] It is important to note that this lawsuit is not a consumer class action under state law which might undermine Rule 23, but is an action solely on behalf of the State and its subordinate governmental arms.

cies request State permission to sue, the District Court's demand that the State obtain authorization from State subdivisions before actions are brought on their behalf by the State, *qua*, State, would permit the tail to wag the dog. The procedural safeguards which Rule 23 seeks to provide are applicable only where individuals or corporate entities possess the independent capacity to sue. The issue of manageability of this action by the District Court presents no difficulty since the departments and agencies of the State are managed, controlled and under the complete authority of the State.

In another context, Judge Bauer, in *Illinois* v. *Assoc. Milk Producers Inc.*, stated that:

> "Justice and judicial economy is best served by having the largest governmental unit sue on behalf of all its parts rather than having multiple suits brought by various political subdivisions within the State." 351 F. Supp. 436, 440 (N. D. Ill. 1972).

There can be no multiple suits by political subdivisions because the State has withdrawn from the subdivisions the power to sue unless the State authorizes such suits. The New Jersey Legislature, acting within the police powers of the State, has created an antitrust agency which is not burdensome on the federal courts or in conflict with federal rules. *See Joseph E. Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 45 (1966), *reh. denied*, 384 U. S. 967 (1966); *Sproles* v. *Binford*, 286 U. S. 374, 388 (1932). Section 12(b) merely simplified and solidified the state role in massive antitrust actions.

POINT III

The District Court Order falls squarely within the meaning of the *Cohen* doctrine of finality.

The concept of the "final judgment" rule emanates from 28 U.S.C. § 1291 (App. A at 1a). Historically, the question of appealability revolves around the competing considerations of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511 (1950). Professor Moore notes that the final judgment rule "will work injustice if inexorably applied", 9 J. MOORE, FEDERAL PRACTICE ¶110.07, at 109, (2d Ed. 1473), and that Section 1291 "has been liberally interpreted to authorize appeals from many decisions which are not 'final' within the ordinary meaning of that term." *Id.*, ¶110.01, at 48. The rigidity of the "final judgment" rule may be departed from where lower court rulings have attendant "serious public consequences." *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945).

The major exception to the finality rule and the hardship which may result from its strict application, was enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), which, coincidently, involved an appeal of a District Court order denying the applicability of a New Jersey statute to the pending federal action. The Supreme Court noted, "[t]he effect of the statute [28 U.S.C. § 1291] is to disallow appeal from any decision which is tentative, informal or incomplete," and that "[s]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Id.*, at 546. The Court concluded that the District Court order

"did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Id.* Holding that the District Court order would not affect or be affected by a decision on the merits and that the New Jersey statute applied in federal court, the Court found:

> "This decision appears to fall in tha' small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. [Citations omitted].
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Id.*, at 546-47.

In expanding upon the pragmatic theory underlying *Cohen* this Court concluded that with orders of "marginal" finality, and because time and money would be saved by resolving the issues involved "in light of the circumstances," the courts of appeals have the power to assert jurisdiction over issues "fundamental to the further conduct of the case." *Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 152-54 (1964).

The Supreme Court's most recent affirmation of the *Cohen* doctrine in *Eisen* v. *Carlisle & Jacquelin*, 94 S. Ct.

2140 (1974), held that the allocation of the cost of notice in a class action suit was a "final" order since it fell within *Cohen's* "small class" of collateral claims of right, unrelated to, and not an ingredient of, the merits of the cause of action. The Court made no mention of any requisite need to show "irreparable harm" to meet the *Cohen* standards, but rather relied on the fact that the order was not tentative or informal, and the issue was collateral and separable from the merits. In analyzing the *Eisen* decision's liberal use of the *Cohen* doctrine, the editors of the ANTITRUST & TRADE REGULATION REPORT opined that "[t]he Court reaffirms . . . the two-pronged test expounded in *Cohen*. . . ." *B. N. A. A. T. R. R.*, No. 680, at B-4 (Sept. 17, 1974).

The Seventh Circuit, having found that *Cohen* requires a three-pronged test, decided that the order below "may qualify" as a "final decision" since it was "separable from and collateral to" the principal action (App. C at 14a). However, the Court of Appeals did not agree that the order was "too important to be denied review" or that substantive rights of the State had been extinguished.

Clearly, the order *sub judice*, is anterior to and not entwined in the legal and factual antitrust questions of the underlying action.[4] The District Court order was not tentative or informal, but decided on the merits the rights granted to the Attorney General by the State in Section 12(b). This is no trivial error of law, nor a subtle diversion of contested State's rights. Rather, the order below is an excessive erosion of the power reserved to the States to control their governmental agencies, as well as a re-

[4] *Cf. Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963).

fusal by the courts below to heed the directive of Rule 17(b), F. R. Civ. P., that the States control the capacity to sue. These decisions not only stifle the flexibility and creativity of New Jersey's Act but ignore and thus substantially corrupt, the power all States constitutionally wield over their units of government.

The New Jersey action is only one of the numerous actions in a complex antitrust litigation. Even measured by optimistic standards, years of protracted litigation may await all plaintiffs. If petitioner must await the outcome of the principal litigation before asserting the rights granted by Section 12(b) the precious benefits which that section provides will be a nullity. Practically, subdivisions and agencies of the State have often "opted-out" of class actions by inadvertence, negligence, or confusion. Thus, the State Legislative determination to eliminate any opt-outs from the State action, in order to ensure a full monetary recovery to which State subdivisions are entitled, would be invalidated if the decisions below are permitted to stand.

The courts have effectively dismembered the governmental arms from the corporate body of the State. In addition our future conduct and behavior in this case has been drastically affected, vis-a-vis any settlement negotiations and damage recoveries. Consequently, petitioner has been placed in a fatal vise by the Court of Appeals, since denial of review may "render impossible any review whatsoever" of our claim. *See United States* v. *Ryan,* 402 U. S. 530 (1971). If we must bide our time until a judgment in the primary action in order to preserve our rights on appeal, then Section 12(b) remains inoperative while our subdivisions are left unprotected. On the other hand, if we must move the District Court to certify a class of political subdivisions under Rule 23 in order to ensure a re-

covery for State agencies, then we moot our issue on appeal, and must proceed in the action contrary to the State Legislative mandate which sought to create a single, unified plaintiff, and centralized enforcement.

This issue is "too important to be denied review" because it calls into question this Court's continued and repeated support for stringent antitrust enforcement and innovative State legislative measures. Unquestionably, the overriding national importance of these policies and the State policy embodied in Section 12(b) have "serious public consequences." Economic reality demands that the States discover novel but legitimate means of protecting the "business or property" of State government. The public demands efficiency in government while petitioner's attempt at increasing the efficiency of antitrust deterrence has been rendered nugatory. The form in which the issue arises should not triumph over the substance of the statute or the antitrust policies expressed by this Court.

POINT IV

The Court of Appeals erred by not reviewing the abuse of discretion by the District Court in refusing to permit the motion to amend.

The amendments to petitioner's complaint were filed under Rule 15(a), F. R. Civ. P. The definitive rule announced by the Supreme Court to control the trial court's discretion in dealing with motions to amend was expressed in *Foman* v. *Davis*, 371 U. S. 178, 182 (1962). The Court in *Stack* v. *Boyle*, 342 U. S. 1, 13 (1951), concluded that "[t]he Appellate Court should only reverse for clear

abuse of discretion or other mistake of law."[5] Similar to the present situation, the Seventh Circuit found, in *Exmoor Country Club* v. *United States*, that:

> "In this case the facts are not in dispute. The problem is one of construction, i.e., the application of the . . . statute. In such situations, where the ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court." 119 F. 2d 961, 963 (7th Cir. 1941).

Reversal may be ordered where the trial court "was in error as a matter of law" and thus abused its discretion.[6]

Technicalities concerning the form of the motion may not govern when the trial court has erred as to a matter of law. In reviewing the motion to amend in order to correct a mistake in the form of the original complaint, the District Court regarded the amendments as seeking to create a class action in avoidance of Rule 23. But, the District Court did not apply the clear rule of law in Rule 17(b), Federal Rules of Civil Procedure, nor even refer to the permission provision of the New Jersey Antitrust Act. The District Court has the responsibility to ensure that motions addressed to the pleadings comport with the standards of *Foman* v. *Davis, supra, e.g.*, determining whether prejudice will result to a party. But where, as

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[5] "[A]n exercise of discretion based on misconception of the law is an abuse of discretion." *Lipsett* v. *United States*, 359 F. 2d 956, 959 (2d Cir. 1966).

[6] *Beck* v. *Wings Field, Inc.*, 122 F.2d 114, 116 (3d Cir. 1941). *See Bowles* v. *Simon*, 145 F.2d 334, 337 (7th Cir. 1944).

here, the District Court made a mistake of law regarding a collateral issue which irreparably damaged substantial rights of petitioner, and, in general, reduces the power all states possess over their subdivisions, the order is ripe for review.

CONCLUSION

For the reasons discussed herein, it is respectfully urged that *certiorari* should issue to review the decision of the court below.

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Attorney for Petitioner.

ELIAS ABELSON,
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Deputy Attorney General,
On the Petition.

APPENDIX A

28 U.S.C. § 1291 and Federal Rules of Civil Procedure

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

Rule 15—Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action

will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States of any agency or officer thereof to be brought into the action as a defendant.

As amended Feb. 28, 1966, eff. July 1, 1966.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or

events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

As amended Jan. 21, 1963, eff. July 1, 1963.

Rule 17—Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought in the name of the United States. No action vides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

As amended Feb. 28, 1966, eff. July 1, 1966.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative ca-

pacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or aginst it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 23—Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numer-

ous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest

of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class,

shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX B

Opinion of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STATE OF NEW JERSEY, on behalf of itself and all political subdivisions and public agencies within the State,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, and CHRYSLER CORPORATION,

Defendants.

M.D.L. No. 65

MEMORANDUM OPINION AND ORDER

The State of New Jersey has moved this Court for leave to file an amended complaint pursuant to Rule 15(a), Federal Rules of Civil Procedure. The gist of the amendment sought to be incorporated into the pleadings by the plaintiff State of New Jersey, is found in the insertion therein of the phrase, ". . . pursuant to the provisions of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b), on behalf of itself and all political subdivisions and public agen-

cies within the State." In explanation of this and other sections of the complaint sought to be amended, the Attorney General of the State of New Jersey says that he is attempting to clarify to the Court and to all parties the representative position of the Attorney General in antitrust matters, in accordance with the powers granted to the Attorney General by the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b), and to accurately reflect the status of political subdivisions and public agencies within the State for the purposes of this action. Stated another way, the Attorney General for the State of New Jersey is seeking to function in this case as representative of a class comprised of all political subdivisions within the State.

The Attorney General bases his authority to so amend on the New Jersey Antitrust Act and particularly that part which reads as follows:

> "The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law." N.J.S.A. 56:9-12(b)

The plain intendment of the New Jersey statute quoted above is to empower the Attorney General of that State to represent the State or any of its public subdivisions or agencies in an action to recover damages under either State or Federal antitrust laws. It does not purport to be, nor could it be, a modification of or an encroachment upon Rule 23 of the Federal Rules of Civil Procedure.

This Court deems the import of this statute, and its effect upon this litigation, to be a declaration by the legis-

lature of the State of New Jersey that that State Attorney General may sue the defendants in this case in the Federal Court on behalf of the State of New Jersey, or any named political subdivision for whom the Attorney General may properly act under New Jersey law. This statute does not mean, however, that without further leave of this Court the Attorney General of the State of New Jersey may sue on behalf of a class of unnamed political subdivisions within the State.

No application on behalf of the Attorney General of the State of New Jersey has been made to proceed as representative of a class composed of all of the political subdivisions and governmental agencies within the State. Absent considerations not now before the Court, this Court would not be disposed to grant leave to so proceed in any event.

The Attorney General for the State of New Jersey may of course proceed in this Court on behalf of the State of New Jersey and on behalf of any other political subdivisions or agencies of the State which become named plaintiffs and authorized the State Attorney General to represent them.

For these reasons, the motion of the plaintiff State of New Jersey for leave to file an amended complaint converting the prior action on behalf of the State into a class action on behalf of all the unnamed politcial subdivisions of the State, is denied.

ENTER:

FRANK J. MCGARR
United States District Judge

Dated: March 7, 1974

APPENDIX C

Opinion and Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted July 19, 1974; July 22, 1974

Before
HON. LUTHER M. SWYGERT, Chief Judge
HON. JOHN PAUL STEVENS, Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge

STATE OF NEW JERSEY, on behalf of itself and all political subdivisions and public agencies within the State,

Plaintiff-Appellant,

vs.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY and CHRYSLER CORPORATION,

Defendants-Appellees.

No. 74-1380

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Appendix C

No. 73 C 1296

FRANK J. MCGARR, Judge.

ORDER

The State of New Jersey has appealed from an order of the district court denying leave to amend its complaint. Simultaneously with the docketing of this appeal, defendants-appellees filed a motion to dismiss the appeal for reason that the order appealed from is interlocutory and nonappealable. By order of this court dated May 20, 1974, appellant was permitted to respond to the motion to dismiss in its main brief on appeal.

In the district court, the State of New Jersey sought to amend its complaint by inserting in the caption of the pleadings "pursuant to provisions of the New Jersey Antitrust Act N.J.S.A. 56:9-12(b)." According to the appellant, the amendment would have corrected an error in the form of the complaint so as to clarify the fact that the Attorney General of New Jersey on behalf of all its political subdivisions and public agencies—and not as representative of named political subdivisions and public agencies as a class under Rule 23, Federal Rules of Civil Procedure—was instituting the action in compliance with the state's Antitrust Act, *supra*.[1] The district court denied leave to amend the complaint after determining that

[1] Apparently, the difference between the original complaint and the proposed amended complaint is that in the latter, New Jersey sought to represent its political subdivisions without complying with the class action requirements of Rule 23, FRCP.

§ 12(b) of the Act[2] could not be construed to permit the Attorney General of New Jersey, without further leave of the district court, to sue on behalf of a class of unnamed political subdivisions within the state. The district court noted that "The Attorney General . . . may of course proceed in this court on behalf of the State of New Jersey and on behalf of any other political subdivisions or agencies of the State which become named plaintiffs and authorize the State Attorney General to represent them."

On appeal here, appellant argues that the order appealed from though facially interlocutory, is "final" and appealable under the doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949) and its progeny.[3] We disagree.

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[2] Section 12(b) of the New Jersey Antitrust Act reads in part as follows:

> "The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law."

[3] It is clear that if the order does not fall within *Cohen* doctrin, it is nonappealable. There is no specific statutory authorization for the instant appeal, nor has the order been certified as appealable by the district judge under 28 U.S.C. § 1292(b). An order denying a motion to amend a complaint, which leaves the original complaint unaffected and does not terminate the case or any part thereof is not a final appealable order under 28 U.S.C. § 1291. *Kulesza* v. *Blair*, 41 F.2d 439 (7th Cir. 1930); *DeNubilo* v. *United States*, 343 F.2d 455 (2d Cir. 1965); 9 *Moore's Federal Practice* (2d ed. 1973), ¶110.08[1], p. 115.

Appendix C

The *Cohen* rule requires three characteristics of an order before it can qualify as a "final decision": (1) the order must be a final determination of a claim of right "separable from, and collateral to" rights asserted in the action; (2) it must be "to important to be denied review," in the sense that it presents a serious and unsettled question;" and (3) its review cannot, in the nature of the question that it presents, await final judgment because "when that time comes, it will be too late effectively to review the . . . order and rights conferred . . . will have been lost, probably irreparably." *Cohen, supra* at 546-47. While the order presently under review may qualify as having characteristic (1), it falls far short of qualifying as having characteristics (2) and (3). The appellant here merely contends that: "The order of the Court below has a pernicious effect on the State antitrust program. If the order stands and the State is forbidden from exercising its inherent and reserved powers to control its own State agencies, then harm to innovative measures for antitrust enforcement will be irremediable." In our opinion the order denying the motion to amend the complaint in the instant case does not present a serious and unsettled question the review of which cannot await final judgment. The district court's order has not extinguished any substantive rights of New Jersey or its political subdivisions to litigate the claimed violations of the antitrust laws, subject to the due process requirements of Rule 23, Federal Rules of Civil Procedure. See *King* v. *Kansas City Southern Industries Inc.*, 479 F. 2d 1259 (7th Cir. 1973); *Eisen* v. *Carlisle and Jacquelin*, 379 F. 2d 119 (2nd Cir. 1966), *cert. den.* 386 U. S. 1035 (1967); *Jumps* v. *Leverone*, 150 F. 2d 876, 877 (7th Cir. 1945).

Accordingly, the motion of the appellees to dismiss this appeal is GRANTED, and the Clerk of the Court is hereby directed to enter the order of dismissal forthwith.

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INDEX

	Page
Interest of These Amici Curiae	1
Reasons for Granting the Writ	4
I. The Decision of the District Court Raises an Important Question Concerning State/Federal/Municipal Relations, the Precise Terms of Which Have Not, But Should Be, Settled By This Court	4
A. There is No Conflict Between the New Jersey Statute and Rule 23	4
B. This Amicus Brief Attests to the Significance of the Issue	8
II. The Issue Was Properly Appealable Within the Meaning of the *Cohen* Doctrine	9
Conclusion	11

CITATIONS

CASES CITED: *Page*

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 2, 9, 10, 11

Day-Brite Lighting, Inc. v. *Missouri*, 342 U.S. 421 (1952) 7

Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 7

Georgia v. *Evans*, 316 U.S. 159 (1942) 8

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 5, 6

Hunter v. *City of Pittsburgh*, 207 U.S. 161 (1907) 4, 5

Illinois v. *Assoc. Milk Producers*, 351 F.Supp. 436 (N.D. Ill. 1972) 6

New York State Dept. of Social Services v. *Dublino*, 413 U.S. 405 (1973) 7

Reynolds v. *Sims*, 377 U.S. 533 (1964) 5

Sailors v. *Board of Education of County of Kent*, 387 U.S. 105 (1967) 6, 7

State of California v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973) 7

State of Illinois v. *Bristol-Myers Company*, 470 F.2d 1276 (D.C. Cir. 1972) 6

Trenton v. *New Jersey*, 262 U.S. 182 (1923) 6

STATUTES AND RULES CITED:

Ariz. Rev. Stat. § 44-1411 *et seq.* 2

Clayton Act, 15 U.S.C. § 15 8

Page

F.R.Civ.P. 17(a) 6

F.R.Civ.P. 17(b) 6

F.R.Civ.P. 23 ..... *Passim*

Mo. Rev. Stat. § 416.011 *et seq.* 2

Neb. Rev. Stat. § 59-821 *et seq.* 2

N.J.S.A. 56:9-12(b) ..... *Passim*

28 U.S.C. § 1291 10

CONSTITUTION CITED:

U.S. CONST. Amend. X ..... *Passim*

U.S. CONST. Amend. XIV 7

U.S. CONST. Amend. XV 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-458

STATE OF NEW JERSEY, pursuant to § 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b),

Petitioner,

v.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY and CHRYSLER CORPORATION,

Respondents.

BRIEF FOR THE STATE OF CONNECTICUT AND THE COMMONWEALTH OF PENNSYLVANIA, ET AL. AS AMICI CURIAE IN SUPPORT OF THE PETITION OF THE STATE OF NEW JERSEY FOR CERTIORARI

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the State of Connecticut, Commonwealth of Pennsylvania, and the States of Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington and West Virginia.

INTEREST OF THESE AMICI CURIAE

Your *Amici*, as States of the Union, have an undeniable interest in the present action. The order of the District Court

raises once again the issue before this Court: What powers may a State constitutionally exercise in controlling its own state agencies and political subdivisions? Your *Amici* believe that the order of the District Court, combined with the failure of the Court of Appeals to apply the *Cohen* doctrine correctly, will have an unmistakably pernicious effect upon the fundamental relationship of the States to their respective governmental agencies, and upon further attempts at the type of innovative legislation which New Jersey has passed, in creating a model centralized authority for the conduct of federal antitrust litigation.[1]

The case at bar is one of those consolidated for pretrial purposes before the Honorable Frank J. McGarr in the United States District Court for the Northern District of Illinois at Multi-District Litigation Docket No. 65.[2]

Petitioner, the State of New Jersey, alleged in its original complaint that it brought this action on behalf of its political subdivisions upon two separate grounds: (1) as a representative pursuant to Rule 23 of the F.R.Civ.P.; and (2) pursuant to Section 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b). Subsequently, the petitioner moved the Court for leave to amend its complaint in order to delete the class action provision. The District Court denied leave to amend stating that the petitioner must proceed by one of two alternate methods: naming all political subdivisions and public agencies as parties plaintiff, or proceeding pursuant to Rule 23 of the F.R.Civ.P. (App. B).[3]

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[1] This is a time when many states are revamping and updating their antitrust legislation and are contemplating new laws. See Ariz. Rev. Stat. § 44-1411 *et seq.* (1974); Mo. Rev. Stat. § 416.011 *et seq.* (Aug. 13, 1974); Neb. Rev. Stat. § 59-821 *et seq.*, as amended by Legislative Bill No. 1028, effective April 16, 1974.

[2] In addition to this current multidistrict litigation, your *Amici* have also been participants in other multidistrict litigation involving antibiotic drugs, automobiles, gasoline, rock salt, asphalt, concrete and cast iron pipe, and master key and lock systems.

[3] Reference is made to Petitioner's Appendix.

The failure of the District Court to recognize that there does, in fact, exist a third alternative is a matter of grave import to your *Amici*.

The New Jersey statute, N.J.S.A. 56:9-12(b),[4] gives to the Attorney General of the State the clear authority to proceed in federal antitrust litigation not only on behalf of the State, but also on behalf of the State's political subdivisions and public agencies. Furthermore, Section 12(b) *uniquely* provides that said political subdivisions and public agencies may *not* sue on their own behalf without first obtaining the permission of the Attorney General. Thus, the State of New Jersey has removed from its political subdivisions and public agencies the capacity to sue on their own behalf.

The District Court, in substantively interpreting Section 12(b) of the New Jersey Antitrust Act, treated the petitioner's leave to amend as a type of subterfuge of Rule 23 of the F.R.Civ.P. Your *Amici* assert that a State does have the power to abrogate the capacity of its political subdivisions and public agencies to sue, and, in essence, to return the political subdivisions and public agencies to the corporate body of the State. The State of New Jersey, suing on behalf of its political subdivisions and public agencies, is *not* suing in a representative capacity. Rather, there is but *one unitary* plaintiff: the State of New Jersey.

The failure of the District Court to recognize the power of the State to sue as a unitary plaintiff, with the result that the petitioner is confined to Rule 23 of the F.R.Civ.P. is, in the opinion of your *Amici*, contrary to stated *principles* of

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[4] N.J.S.A. 56:9-12(b) states in relevant part:

The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law.

previous decisions of this Court. Moreover, the ruling of the District Court reveals that an important and novel question of federal/state/municipal relations has, heretofore, never been presented to this Court in its present form.

Your *Amici* believe that the issue centers ineluctably upon powers historically reserved to the States by the Tenth Amendment to the United States Constitution. We believe that the distinction that we shall draw, *infra*, was lost upon the District Court, and unrecognized by the Court of Appeals. (App. C)

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE DISTRICT COURT RAISES AN IMPORTANT QUESTION CONCERNING STATE/FEDERAL/MUNICIPAL RELATIONS, THE PRECISE TERMS OF WHICH HAVE NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

A. THERE IS NO CONFLICT BETWEEN THE NEW JERSEY STATUTE AND RULE 23 OF THE F.R.CIV.P.

1. In *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), the Supreme Court clearly enunciated the principle that a State Legislature may exercise extraordinary power over its own political subdivisions and public agencies:

> "This court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties and the rights of their citizens and creditors . . . . We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon whenever they may be applicable. Municipal corporations

> are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . *The State, therefore, at its pleasure may modify or withdraw all such powers,* . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.* In all these respects the State is supreme and its legislative body, conforming its action to the state constitution, may do as it will . . . . *The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." Id.*, at 177-79. (emphasis added).

2. In recent years, the Supreme Court has applied the principle of *Hunter* v. *City of Pittsburgh* in specific circumstances. (See *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964)).

In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), the respondents, therein, unsuccessfully attempted to exalt *Hunter* into an absolute. (*Id.*, at 342).

Mr. Justice Frankfurter stated:

> "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.*, at 344-345.
>
> "When a State exercises power wholly within the domain of State interest, it is insulated from federal

judical review. But such insulation is not carried over when the State power is used as an instrument for circumventing a federally protected right." *Id.*, at 347.

Thus, restrictions upon the State are governed by reference to a specific federally protected right.[5] (See *Sailors* v. *Board of Education of County of Kent*, 387 U.S. 105, 109 (1967)).

3. In the case at bar, no constitutional prohibition is present.[6] The State of New Jersey has done nothing more or less than delimit the capacity of its political subdivisions and public agencies to sue on their own behalf.[7] In cases in which this Court has held that a State was restrained in its exercise of control over its political subdivisions and public agencies,

---

[5] In *Gomillion*, of course, the specific federal right was the right to vote as protected by the Fifteenth Amendment to the United States Constitution.

[6] In addition, the F.R.Civ.P. specifically provide that states may control the capacity of their political subdivisions to sue by creating state statutes for that purpose. (See F.R.Civ.P. 17(b)). In fact, in *State of Illinois* v. *Bristol-Myers Company*, 470 F.2d 1276 (D.C. Cir. 1972), the court noted, in reference to an action brought pursuant to the Illinois Antitrust Act, that the District Court had properly permitted Illinois to proceed "on behalf of all political subdivisions organized *under state authority*, pursuant to Illinois Revised Statutes". *Id.* at 1277. (emphasis added).

However, your *Amici* wish to make clear that we do not suggest, and New Jersey does not argue, that a state must possess a state statute permitting antitrust actions on behalf of political subdivisions and public agencies before its Attorney General may bring such actions in Federal Court. Rather, each state's Attorney General may proceed as a representative of a class composed of the governmental entities organized under state law. (See *State of Illinois* v. *Bristol-Myers, supra; Illinois* v. *Assoc. Milk Producers*, 351 F.2d 436 (N.D. Ill. 1972)).

Further, independent and sufficient federal support and authority for the state to serve as statutory representative of its political subdivisions emanates from Rule 17(a) F.R.Civ.P. which provides in relevant part: "an executor . . . *or a party authorized by statute may sue in his own name* without joining with him the party for whose benefit the action is brought." (emphasis added)

[7] It should be noted that this Court has previously held that municipal corporations have no privileges or immunities. *Trenton* v. *New Jersey*, 262 U.S. 182 (1923).

the federally protected right was that right actually possessed by the *citizens* of said municipality.[8]

4. Moreover, the New Jersey Antitrust Act constitutes innovative state legislation, creating a state-wide authority under the control of the Attorney General for the prosecution of federal antitrust violations.[9] There thus exists a legitimate, if not overriding, state interest in the abrogation of the capacity of the political subdivisions and public agencies to sue on their own behalf without the prior consent of the Attorney General.

5. The District Court, below, treated the New Jersey Statute as a subterfuge of Rule 23 of the F.R.Civ.P. and thus, *sub silentio*, has stated that N.J.S.A. 56:9-12(b) is inconsistent with federal law. (App. B)

Since the power of the State to abrogate the capacity of its political subdivisions and public agencies to sue on their own behalf is not impaired by any provision of the United States Constitution, reliance upon Rule 23 and, more importantly, upon the procedural safeguards of which the courts below speak, are entirely inapposite.[10]

---

[8] For example, the right to vote in *Gomillion* was that right possessed by the disenfranchised black citizens of the city of Tuskegee.

[9] This Court has steadfastly supported the view that so long as they avoid conflict with the federal laws, "the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standards of the public welfare . . . ." *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). The states must have "vast leeway in the management of [their] internal affairs." *Sailors* v. *Board of Education of County of Kent*, 387 U.S. 105, 109 (1967). Since the States have "broad scope to experiment with economic problems," *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963), they "must be allowed considerable latitude in attempting their resolution." *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973).

[10] In *State of California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973) *parens patriae* was rejected as a substitute for Rule 23 in part because procedural safeguards were lacking. The "class" in *Frito-Lay*, though, was not composed of political subdivisions, but rather citizen/consumers. The Fourteenth Amendment problems in the case are thus obviously distinguishable from the instant action.

The State, thus, stands in an entirely different relation to its political subdivisions and public agencies than a State does to its citizens, or a representative of a class does to the members of the class.

A State, as here, in abrogating the capacity of its governmental agencies to sue has removed their capacity to be deemed "persons" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15. Consequently, if a political subdivision is not a "person", *a fortiori*, it cannot be a member of a class of "persons" vindicating an interest under the antitrust laws pursuant to Rule 23. On the other hand, it is axiomatic that a state could not abrogate the capacity of its *individual citizens* to be deemed "persons" within the meaning of Section 4 of the Clayton Act.

Thus, the State of New Jersey may constitutionally abrogate the capacity of its political subdivisions and public agencies to sue on their own behalf, return said entities to the corporate body of the State, then sue on behalf of said entities as a unitary plaintiff without being treated as the representative of a class pursuant to Rule 23 of the F.R.Civ.P.

6. Your *Amici* believe, for the reasons stated, *supra*, that the decision of the District Court constitutes a clear encroachment upon an area of law reserved to the States by the Tenth Amendment to the United States Constitution.

B. THIS AMICUS BRIEF ATTESTS TO THE SIGNIFICANCE OF THE CASE.

In *Georgia* v. *Evans*, 316 U.S. 159 (1942), wherein a State was deemed to be a "person" within the meaning of the treble damage provision of the federal antitrust laws, 15 U.S.C. § 15, this Court, per Mr. Justice Frankfurter, noted:

> "The importance of the question . . . is attested by the fact that thirty-four states, as friends of the Court, supported

Georgia's request that the decision be reviewed on certiorari. *And so we brought the case here." Id.,* at 161. (emphasis added).

Your *Amici*, thirty-six States of the Union, are here again urging this Court to accept a case on certiorari which raises an important question concerning federal/state/municipal relations.

II

THE ISSUE WAS PROPERLY APPEALABLE WITHIN THE MEANING OF THE COHEN DOCTRINE

The order of the District Court must be inspected carefully, for it is apparent to your *Amici* that the courts below misconstrued the original motion of the Petitioner. The manner in which the District Court's order is framed indicates that the District Court interpreted the original motion as a request to amend the complaint in order to convert the prior action, on behalf of the State, into a class action on behalf of all unnamed political subdivisions.[11]

The actual intent of the Petitioner's motion, was not to convert the prior action into a class action, but rather it was an attempt to amend the complaint to bring the action solely "pursuant to provisions of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b)."

The Petitioner's claim is that it has been empowered by N.J.S.A. 56:9-12(b), pursuant to the powers reserved to the States by the Tenth Amendment to the United States Con-

---

[11] "For these reasons, the motion of the plaintiff State of New Jersey for leave to file an amended complaint *converting the prior action on behalf of the State into a class action on behalf of all unnamed political subdivisions of the State is denied."* (Emphasis added by your *Amici*) (App. B)

stitution, to bring antitrust actions on behalf of the State, its political subdivisions, and public agencies wherein the sovereign State "shall be deemed a person". The issue therefore is not the proper joining and identification of parties, nor is it the proper certification under Rule 23, F.R.Civ.P. Rather, the issue is the extent of the State's sovereign power over its public agencies and political subdivisions as suggested in Section I-A of this brief.

Viewed in this light, your *Amici* urge that the order appealed from is final and appealable under 28 U.S.C. § 1291 as interpreted in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

It was held by the Court of Appeals below that the order would be "final" and appealable if it met the three characteristics of the *Cohen* doctrine. (App. C) It was further held that the order satisfied the first characteristic, *viz.* the order was a final determination of a separate and collateral claim of right. However, the Court also held that the order failed to meet the remaining two characteristics of the *Cohen* doctrine. As stated in the opinion by the Court of Appeals, below, these are:

> ". . . (2) it must be 'too important to be denied review,' in the sense that it presents a serious and unsettled question; and (3) its review cannot, in the nature of the question that it presents, await final judgment because 'when that time comes it will be too late effectively to review the . . . order and rights conferred will have been lost, probably irreparably.' *Id.*, at 546-47." (App. C)

It can no longer be said that these two characteristics of the *Cohen* doctrine are not satisfied. This is a serious and unsettled question, the review of which cannot await final judgment. This is not a simple question regarding alternative methods of proceeding, but rather it is an important, complex, and unsettled question that goes right to the heart

of the Tenth Amendment to the United States Constitution. The response by your *Amici* to this question attests to its seriousness. (See Section 1-B, *supra*) Furthermore, this is not a question that can await final judgment for review. The order as framed has extinguished Constitutional and statutory rights of New Jersey, which rights will be irreparably lost if review is delayed.

For these reasons your *Amici* contend that the order of the District Court did fall within the *Cohen* doctrine, and is a final and appealable order.

CONCLUSION

Your *Amici*, thirty-six States of the Union, respectfully urge this Court to grant the petition for a writ of certiorari prayed for herein by your Petitioner, the State of New Jersey.

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SUPREME COURT, U. S.

FILED

NOV 20 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-458

STATE OF NEW JERSEY, pursuant to § 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b),

Petitioner,

vs.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, and CHRYSLER CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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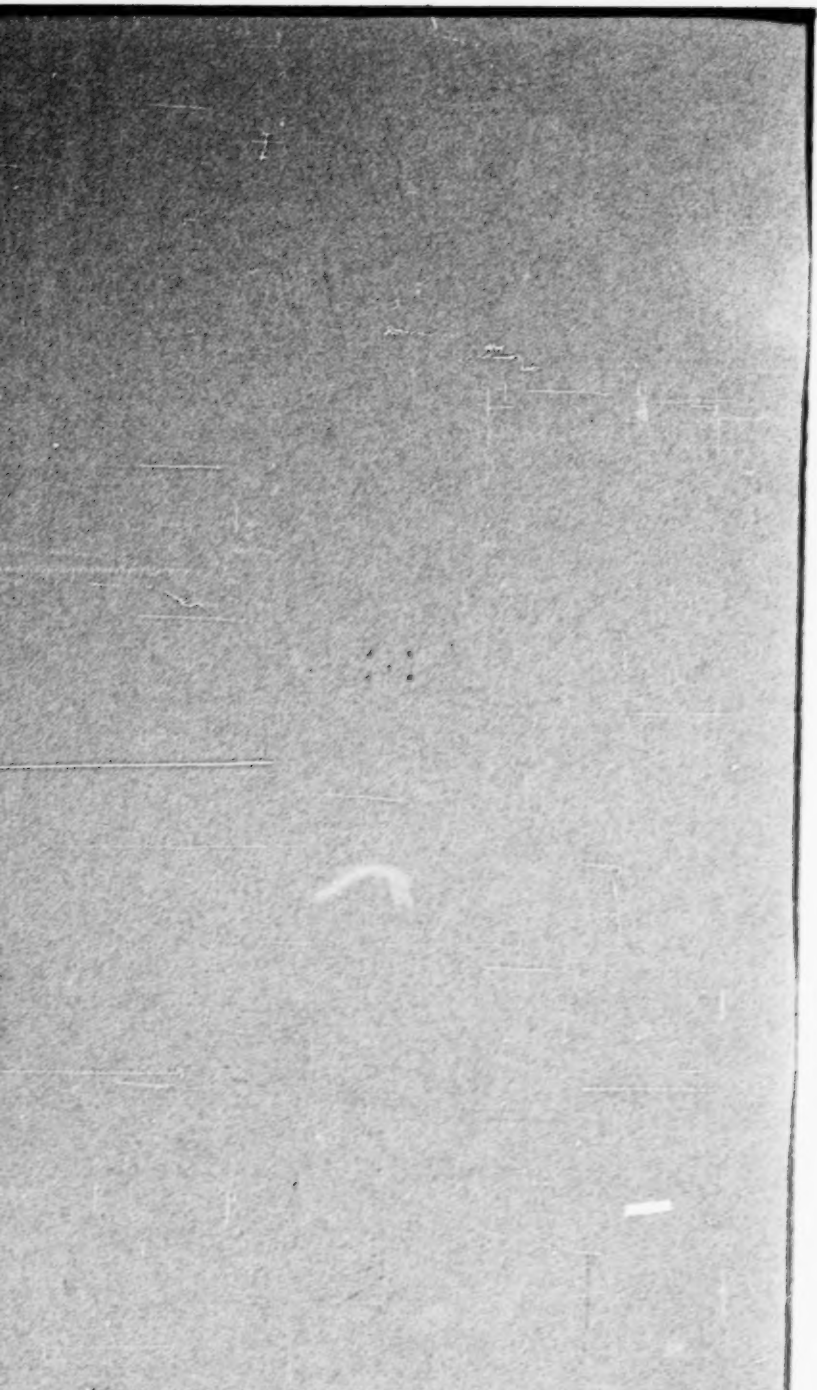

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Federal Statute Involved	3
Statement	3
Reasons for Denying the Petition	6
A. The Decision of the Court of Appeals Dismissing Petitioner's Attempt to Appeal As Of Right Was Required By Section 1291 of the Judicial Code, And Is Not In Conflict With Any Decision of This Court or Of Other Courts of Appeals	6
B. This Court Should Not Review Complicated Questions of State Law Without Benefit of Prior Consideration by the New Jersey Courts or by the Lower Federal Courts	9
CONCLUSION	11
APPENDIX A	A-1

TABLE OF AUTHORITIES

	PAGE
Azar v. *Conley*, 480 F.2d 220 (6th Cir. 1973)	7
Baxter v. *United Forest Products Co.*, 406 F.2d 1120 (8th Cir. 1969)	7
Chicago v. *Fieldcrest Dairies*, 316 U.S. 168 (1942)	10
Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949)	7
DeNubilo v. *United States*, 343 F.2d 455 (2d Cir. 1965)	7
Eisen v. *Carlisle & Jacquelin*, 42 U.S.L.W. 4804 (May 28, 1974)	8
Hartford Fire Insurance Co. v. *Herrald*, 434 F.2d 638 (9th Cir. 1970)	7
Jumps v. *Leverone*, 150 F.2d 876 (7th Cir. 1945) ..	7
Kulesza v. *Blair*, 343 F.2d 439 (7th Cir. 1930)	7
Lehman Bros. v. *Schein*, 416 U.S. 386 (1974)	10
Louisiana P. & L. Co. v. *Thibodaux City*, 360 U.S. 25 (1958)	10
Lupia v. *Stella D'Oro Biscuit Co.*, 42 U.S.L.W. 3666 (May 31, 1974)	9
State of New Jersey v. *Emhart Corp.*, D.C. Conn., October 30, 1974, Appendix A	8

Constitutional Provisions Cited

Constitution of the State of New Jersey, Article 4, Section 7, ¶ 11	9

Statutes Cited

	PAGE
28 U.S.C.:	
§ 1254	2
§ 1291	3, 5, 6, 7
§ 1292	5
§ 1407	3
New Jersey Statutes:	
40:69-29	9
40:69A-30	9
56:9-12(b)	9, 10

Other Authorities

9 Moore's Federal Practice (2d ed. 1973), ¶ 110.08 [1] 7

IN THE

Supreme Court of the United States

October Term 1974

No. 74-458

STATE OF NEW JERSEY, pursuant to § 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b),

*Petitioner**,

vs.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, and CHRYSLER CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of respondents, General Motors Corporation ("GM"), Ford Motor Company ("Ford") and Chrysler Corporation ("Chrysler"), in opposition to the Petition of the State of New Jersey, which seeks review of an order, filed July 22, 1974, by the United States Court of Appeals for the Seventh Circuit dismissing, for lack of jurisdiction, an appeal by petitioners from a pre-trial order of the United States District Court for the Northern District of Illinois denying petitioner leave to amend its complaint.

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* We note that, in order to avoid confusion, the caption here stated is copied from the Petition, even though it is *not* the caption of the State of New Jersey's pending action in the District Court or the Briefs on appeal to the Court of Appeals. This caption is taken from the proposed amended complaint, which the District Court refused to allow.

Opinions Below

The decision of the Court of Appeals, dismissing petitioner's appeal for lack of jurisdiction, and of the District Court, denying petitioner's motion for leave to amend its complaint, are unreported, but are annexed to the State of New Jersey's Petition as Appendices C and B, respectively.

Jurisdiction

The jurisdiction of this Court is purportedly invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

Respondents disagree with petitioner's statement of the questions presented for consideration by this Court.

In holding that it lacked jurisdiction to entertain an appeal as of right from an interlocutory pre-trial order of the District Court, which merely denied petitioner leave to file an amended complaint and did *not* affect the original complaint, the Court of Appeals declined comment on petitioner's interpretation of its state statute. The questions of what effect, if any, New Jersey's antitrust act could have upon federal procedure in a federal action, and of whether or not petitioner's state statute was intended to alter substantive rights of its political subdivisions and agencies, were not even briefed by respondents in the Court of Appeals.

Accordingly, the sole question presented for consideration by this Court, of necessity, is limited as follows:

> Whether the Court of Appeals properly held that denial of leave to amend a complaint was not a

"final decision" appealable as of right under 28 U.S.C. § 1291 where all objections to the District Court's ruling can be reviewed by a later appeal in the ordinary course and where the ruling concerns a discretionary procedural matter and does not affect any substantive right.

Federal Statute Involved

Section 1291 of the Judicial Code, 28 U.S.C. § 1291, which proscribes the jurisdiction of the Courts of Appeals with respect to appeals as of right from "final" decisions of the District Courts, is set forth in Appendix A of the State of New Jersey's Petition.

Statement

Petitioner, the State of New Jersey, is one of thirty-four states which has instituted suit on behalf of itself and its political subdivisions, charging respondents with violations of the antitrust laws in the manufacture, sale and distribution of automobiles in the "fleet market", and has had its action consolidated and transferred pursuant to 28 U.S.C. § 1407 for coordinated pre-trial proceedings in the Northern District of Illinois before the Honorable Frank J. McGarr.*

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* The private actions pending before Judge McGarr are substantially identical to certain civil and criminal actions brought by the United States in the Eastern District of Michigan against GM and Ford. The United States' cases were fully tried and decided in favor of defendants. Judge McGarr's task of coordination in these treble damage actions, therefore, involved managing the numerous private actions assigned to him for pretrial purposes, as well as guiding their preparation in conjunction with the simultaneous progress of the United States' actions.

On January 12, 1972, long before the State of New Jersey instituted its action, Judge McGarr, determined, over the opposition of respondents, that each plaintiff-state could represent its own political subdivisions and ordered each such action to proceed as a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure. Subsequent determinations by Judge McGarr have permitted each new plaintiff-state to represent its own subdivisions.

In May, 1973—more than 14 months following Judge McGarr's class action order—the State of New Jersey instituted its action as the alleged Rule 23 representative of a class composed of all political subdivisions and public agencies within the State. After each defendant had filed its answer to the complaint, and at a time when all parties were engaged in active pre-trial discovery and preparation for a future trial, or trials, of these actions, the State of New Jersey sought leave to amend its complaint. The purpose of the proposed amendment, it stated, was to eliminate all reference to Rule 23 from the complaint, in order that it might proceed in federal court under its own procedural statute (See the State of New Jersey's Petition, p. 4). This statute, it argued, would ensure that none of its political subdivisions would opt out of the State's action (See the State of New Jersey's Petition, p. 5), regardless of whether or not each subdivision could properly allege any injury as required by Section 4 of the Clayton Act.

On March 7, 1974, after full briefing of all aspects of the questions presented, Judge McGarr entered his opinion and order denying petitioner's motion for leave to amend its complaint (Appendix B of the State of New Jersey's Petition).

On March 29, 1974, without having sought certification of the order as involving "a controlling question of law as to which there is substantial ground for difference of opinion" (28 U.S.C. § 1292(b)), petitioner filed its appeal in the Court of Appeals for the Seventh Circuit. Respondents, appellees below, moved to dismiss the appeal on the grounds that an order by a District Court denying a plaintiff leave to amend a complaint, which leaves the original complaint still standing, is not a "final" order appealable as of right under 28 U.S.C. § 1291.

The Court of Appeals, after consideration of petitioner's brief, dismissed the appeal for lack of jurisdiction, holding:

> ". . . the order denying the motion to amend the complaint in the instant case does not present a serious and unsettled question the review of which cannot await final judgment. The district court's order has not extinguished any substantive rights of New Jersey or its political subdivisions to litigate the claimed violations of the antitrust laws, subject to the due process requirements of Rule 23, Federal Rules of Civil Procedure." (Appendix C, p. 14a, of the State of New Jersey's Petition)

Petitioner now seeks review of that order of the Court of Appeals on the grounds that the Court of Appeals should have entertained its attempt to appeal as of right from Judge McGarr's pre-trial order, and asks that this Court intercede in these coordinated pre-trial proceedings in order to determine whether or not Judge McGarr abused his discretion in requiring that petitioner proceed in accordance with Rule 23.

Reasons For Denying the Petition

Petitioner has failed to state any reason to justify issuance of a writ of certiorari in this case. The decision of the Court of Appeals dismissing petitioner's appeal as required by 28 U.S.C. § 1291 is not in conflict with any decision of this Court or of other Courts of Appeals which have been presented with an interlocutory pre-trial order denying leave to amend a complaint. Because the original complaint under Rule 23 remains unaffected and because petitioner will not irretrievably lose its right to be heard after judgment, this Court, we submit, should not intercede in coordinated pre-trial proceedings merely to permit petitioner to alter its basis for representation, thereby proceeding on a different basis than the 33 other actions which still are pending in the transferee court.

In addition, and of equal importance, because petitioner's interpretation of its legislation conflicts with controlling provisions of New Jersey's own constitution, any judgment by this Court regarding the statute would be premature until New Jersey's highest court has considered these state questions of first impression, which have not even been considered by the District Court or the Court of Appeals.

A. The Decision of the Court of Appeals Dismissing Petitioner's Attempted Appeal As Of Right Was Required By Section 1291 of the Judicial Code And Is Not In Conflict With Any Decision of This Court or Of Other Courts of Appeals.

Based upon the procedural history of this action, it is clear that the order of the District Court, denying petitioner's motion for leave to amend its complaint, did not finally dispose of petitioner's case or any part thereof. In

such a situation, the Courts of Appeals have been unanimous in refusing to entertain an appeal as of right under Section 1291 of the Judicial Code, *Azar* v. *Conley*, 480 F.2d 220 (6th Cir. 1973); *Hartford Fire Insurance Co.* v. *Herrald*, 434 F.2d 638 (9th Cir. 1970); *DeNubilo* v. *United States*, 343 F.2d 455 (2nd Cir. 1965); *Kulesza* v. *Blair*, 41 F.2d 439 (7th Cir. 1930); particularly where the district court, in its discretion, attempted to reasonably limit the scope of suit, and did not impair plaintiff's substantive rights to litigate its claim. *Jumps* v. *Leverone*, 150 F.2d 876, 877 (7th Cir. 1945). See also, 9 *Moore's Federal Practice*, (2d Ed. 1973) ¶ 110.08[1], p. 115.

As interpreted by this Court in *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), Section 1291 requires that an interlocutory order of a district court may not be appealed as of right unless it (a) finally adjudicates a substantive legal right; (b) is collateral to the merits; and (c) is not susceptible to meaningful review after final judgment. *Id.* 545-547.

In *Cohen*, however, this Court carefully distinguished between the "final disposition of a claimed right" in that case and the type of order from which the State here seeks to appeal. Where, as here, the order of the District Court "involved only an exercise of discretion", appeal as of right, the Court held, would not be allowed. 337 U.S. at 547. To the same effect, see *Baxter* v. *United Forest Products Co.*, 406 F.2d 1120, 1123 (8th Cir. 1969), where it was stated that the test is "whether the order involves an adjudication of an important question of law or is only an exercise of the court's discretion."

The distinction in *Cohen* between a "final disposition" and Judge McGarr's discretionary denial of leave to

amend under Rule 15(a) of the Federal Rules of Civil Procedure is essential because Judge McGarr's order is subject to reconsideration from time to time as justice may require. This fact, alone, would be sufficient under *Cohen* to distinguish this petitioner from the appellant there.* Under any other test, the numerous discretionary procedural decisions throughout every lawsuit would give rise to disruptive, and delaying, piece-meal appeals.

In *Eisen* v. *Carlisle & Jacquelin*, 42 U.S.L.W. 4804 (May 28, 1974), this Court, again, did not construe Section 1291 to permit appeals as of right from *any* order of a district court which affects the class status of a plaintiff's action. To the contrary, *Eisen*, like *Cohen*, specifically limited its application to situations where the order of a district court finally determines a collateral right which, itself, is allegedly determinative of whether a case will proceed, necessitating immediate review to prevent an irretrievable loss of the right asserted. Id. at 4808-09.

That these holdings have not opened the floodgates of appellate review to every plaintiff who attempts an appeal

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* For example, in *State of New Jersey* v. *Emhart Corporation* (D.C. Conn., October 30, 1974), which is reproduced herein as Appendix A, the District Court rejected a similar motion by New Jersey in another federal antitrust action where the State also sought leave to amend its complaint in an effort to proceed only under its State statute. There, as here, the Court denied the State's motion for leave to withdraw its Rule 23 allegations, stating that:

> "Without becoming involved in the State of New Jersey's legal relationships to its political subdivisions and agencies at this point in this proceeding, the motion for leave to file a second amended complaint therefore shall be denied. However, the Court will grant leave to renew should the class [under Rule 23] prove incapable of certification." (Appendix A, p. A4).

as of right from a district court's class action determination, is confirmed by this Court's recent decision in *Lupia* v. *Stella D'Oro Biscuit Co.*, 42 U.S.L.W. 3666 (May 31, 1974) which, after *Eisen*, denied a petition for writ of certiorari in a case where plaintiff was denied class action status by order of the district court, sounding the "death knell" for the claims of his putative class members.

A fortiori, the petition here should also be denied since the opinion of the District Court denying petitioner leave to amend its complaint did *not* deny class action status under Rule 23, but anticipated approval of petitioner's class action as originally alleged and specifically recognized the right of New Jersey's subdivisions to be represented by the State Attorney General as *named parties* if they wished to become parties to the litigation.

B. This Court Should Not Review Complicated Questions of State Law Without Benefit of Prior Consideration by the New Jersey Courts or by the Lower Federal Courts.

The issues which the State of New Jersey asks this Court to determine *de novo* involve complicated questions of New Jersey constitutional and statutory law, affecting the relationship between the State and its municipalities and subdivisions, which have never been passed on by the New Jersey courts and were neither presented to, nor considered, by the courts below.*

* These include: (1) whether the interpretation of N.J.S.A., Section 56:9-12(b), urged by the Attorney General is correct; (2) whether the Attorney General's interpretation is consistent with N.J.S.A., Sections 40:69-29 and 40:69A-30 concerning the delegation of powers "to sue and be sued"; and (3) whether the Attorney General's interpretation of the statute, and the statute if so construed, is consistent with Article 4, § 7, ¶ 11 of the New Jersey Constitution.

In these circumstances, as this Court has previously held, it is inadvisable for a federal court to decide these issues of state law. As stated in *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U.S. 25, 28 (1959), "[W]here [a state law] issue touched upon the relationship of City to State . . . [the Supreme Court has] *required* District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination", since "[t]he determination which the District Court, the Court of Appeals, or [this Court] might make could not be anything more than a forecast—a prediction as to the ultimate decision of the [state court]." *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, 172 (1942). (Emphasis added.)

In view of the strong doubt that petitioner, under its constitution and statutes, may impose the limitation upon the autonomy of its subdivisions and agencies which the Attorney General suggests were imposed by N.J.S.A. Section 56:9-12(b), this Court should await a conclusive judgment by New Jersey's highest court and should not precipitously seek to resolve questions of state law that were never considered by the courts below. *Cf. Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974).

CONCLUSION

For the reasons stated herein, the Petition of the State of New Jersey for a Writ of Certiorari to the Seventh Circuit should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

M.D.L. Docket No. 45

Civil Action No. 15664

STATE OF NEW JERSEY, on behalf of itself and all other public bodies in the State of New Jersey similarly situated

v.

EMHART CORPORATION, SARGENT & COMPANY, EATON CORPORATION, and ILCO CORPORATION

Ruling on Plaintiff New Jersey's Motion For Leave to File Second Amended Complaint

The State of New Jersey, by its Attorney General, originally entered this complex antitrust action as a separate party by a complaint in which it claimed to be the representative of a class consisting of political subdivisions and agencies of the State which had suffered injury by reason of the defendants' alleged illegal conduct.[1] By this motion the Attorney General seeks to rationalize his presence in this suit on different grounds, *viz.*, that he is appearing for the State, which is asserting as *its own* claim the injuries of its political subdivisions and agencies.

The Attorney General's argument is that the first amended complaint did not accurately reflect his authority

[1] Several other states are also separate parties plaintiff.

to bring suit under § 12(b) of the New Jersey Antitrust Act, N.J.S.A. § 56.9-12(b), which provides in part:

> "The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law."

Because the State does not give any subdivision or agency the power to sue except by permission of the Attorney General, the argument is that these bodies cannot be "parties" (*i.e.*, cannot themselves sue) if the State does not let them do so. Here they have not been granted permission to sue by the Attorney General, and thus the Attorney General contends:

> "The delegated authority to subdivisions and agencies to exercise the right to sue has been subordinated to the State suit and the State is suing for injuries to its parts. The State is not, as defendants assert, a 'representative' of other 'parties'. Rather the State is the one injured, and the State by the Attorney General is the party capable of bringing suit for such injury until the Attorney General decides otherwise." Memorandum in Support of Motion 11.

The defendants object that New Jersey by this motion is simply seeking the right to represent a class consisting of its agencies and subdivisions without complying with the federal rules for class actions. Fed. R. Civ. P. 23 requires, *inter alia*, that to maintain a class action it must be shown

that the parties are so numerous that joinder would be impracticable, that there are questions of fact and law common to the class, and that the named plaintiff is typical of the class. To date such showings have not been made; the class pleaded in New Jersey's first amended complaint has yet to be certified.

The legal arguments against the plaintiff's motion are ably set out in the defendants' briefs. The defendants disagree with New Jersey's interpretation of its own law, arguing that the State's political subdivisions are authorized to sue without permission from the Attorney General, and that they must be parties to the action (either joined or represented in a class action) if their claims are to be litigated. *See* Reply Memorandum in Opposition to Motion 1-6. Further, the defendants argue that state law is irrelevant to the question of when a class action is to be maintained, citing cases rejecting state attempts (authorized by state law) to appear on a *parens patriae* theory and upholding the right of a state to represent its agencies and subdivisions in a class action although not specifically authorized by state law to do so. *See* Memorandum in Opposition to Motion 3-5.

The Court finds it unnecessary at this point to try to assess the persuasiveness of these competing legal arguments. The State of New Jersey has asked the Court to allow an amended complaint to be filed, and so the determinative question is whether justice requires the Court to so exercise its discretion. *See* Fed. R. Civ. P. 15(a). Whether or not New Jersey's legal theories are correct (which would govern whether the State could initially bring suit separately by its proposed second amended complaint), it seems

clear that in the interest of "justice" it would be preferable to employ the rule 23 procedure with respect to New Jersey and its subdivisions and agencies. The class action rules provide significant protection for those who are members of the class: the action cannot be dismissed or compromised without approval of the Court and notice to members of the class. *See* Fed. R. Civ. P. 23(d)-(e). New Jersey's subdivisions and agencies would not have the same opportunity to object or have the Court speak for their interests if the State's motion to amend were to be granted.

Without becoming involved in the State of New Jersey's legal relationships to its political subdivisions and agencies at this point in this proceeding, the motion for leave to file a second amended complaint therefore shall be denied. However, the Court will grant leave to renew should the class prove incapable of certification. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 30th day of October, 1974.

M. JOSEPH BLUMENFELD
M. Joseph Blumenfeld
United States District Judge